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YRC Inc., d/b/a YRC Freight and Fred Rose. Case 13-CA-087525

April 30, 2014 DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

On February 15, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed cross-exceptions and a supporting brief, and both parties filed an answering brief and a reply brief

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order dismissing the complaint.

We adopt the judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by denying an employee's request for a *Weingarten*¹ representative and then discontinuing the interview. We also affirm the judge's dismissal of a second Section 8(a)(1) allegation concerning discipline the Respondent subsequently issued the employee. For the reasons stated by the judge and those set forth below, we find that the discipline was lawfully imposed.

I. BACKGROUND

The Respondent operates a trucking company and has a unionized facility in Bolingbrook, Illinois. On August 2, 2012,² truckdriver Fred Rose reported to work at his normal start time of 6 a.m. Around 7:47 a.m., the Respondent's dock supervisor, Vito Caponigro, saw Rose begin to pull out of the yard. Rose's expected departure time was between 6:30 and 6:45 a.m. According to Caponigro, he had not decided whether to discipline Rose at that time.

Caponigro approached Rose and asked why he was delayed. Rose asked whether Caponigro's question was investigatory. Caponigro said that he was asking Rose a question. Rose stated that, if the question was investigatory, he would like a union steward present. Caponigro told Rose that no stewards were then available, but that Rose could pick someone else. (The collective-bargaining agreement allowed a coworker to serve as a representative when a steward was unavailable.) Rose said that he did not know who was at work that day and asked to see a list of employees scheduled to work. Caponigro responded that Rose would be receiving discipline for misuse of company time. On August 8, Caponigro mailed Rose a warning letter. The letter stated that Rose was being disciplined because, in Caponigro's words, "I asked you what were your delays. You could offer *no valid reason* as to why you were delayed" (emphasis added).

The judge rejected both allegations asserted by the General Counsel: that the Respondent violated Section 8(a)(1) by denying employee Rose's request to participate in the investigative interview with a *Weingarten* representative, and by issuing a warning letter regarding Rose's late departure from the yard. The judge credited Caponigro's testimony that he disciplined Rose for misusing company time, and not because Rose requested *Weingarten* representation. Regarding the discipline issue, the judge stated:

At the time Caponigro decided to discipline Rose all he knew, from personal observation, was that Rose was at least an hour late leaving Respondent's yard. The fact that Caponigro did not decide to discipline Rose until he asked for union representation does not necessarily establish that Rose was disciplined for asserting his *Weingarten* rights. The fact that B occurred after A does not necessarily mean that B was the result of A, particularly when there is an alternative explanation for B.

Were I to conclude that Respondent's warning letter was motivated by a desire to retaliate against Rose for asking for union representation, I would find a violation of the Act. However, such an inference is not warranted here. Rose was clearly an hour late starting his route and given his failure to offer Caponigro any explanation, I credit Caponigro's testimony that he disciplined Rose for misusing company time.

II. ANALYSIS

This case is governed by the Supreme Court's *Weingarten* decision and its progeny. In *Weingarten*, the Supreme Court held that an employee has a right to request the attendance of a union representative in any interview that he or she "reasonably fears may result in his

¹ NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

² All dates are in 2012.

discipline." Weingarten, 420 U.S. at 256. Two wellestablished Weingarten principles are relevant in the instant case.

First, the Act protects an employee from retaliation motivated by an employer's hostility towards an employee's *Weingarten* request. *Taracorp, Inc.*, 273 NLRB 221, 223 fn. 12 (1984) ("A make-whole remedy can be appropriate in a *Weingarten* setting if, but only if, an employee is discharged or disciplined for asserting the right to representation.") (citing *Garment Workers ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975)).

Second, an employer confronted with an employee request for *Weingarten* representation may respond by choosing *not* to move forward with the investigative interview. In such a situation, there are two consequences, both permitted under *Weingarten*: (a) the employee is deemed to be "relinquishing" any benefit associated with explanations the employee might have conveyed during the aborted interview; (b) the employer can make a disciplinary decision based on other information in its possession. *Weingarten*, 420 U.S. at 258–259.

These aspects of *Weingarten* received extended discussion in the Supreme Court's decision:

[T]he employer [following a request for representation] is *free to carry on his inquiry without interviewing the employee*, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and *forgoing any benefits that might be derived from one*.

. . .

The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.

. . . .

[I]f the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and

without such additional facts as might have been gleaned through the interview.³

We agree with the judge that the Respondent did not violate Section 8(a)(1) by refusing Rose's request for union representation. As noted above, *Weingarten* expressly provides that, when an employee requests *Weingarten* representation, the employer may choose not to move forward with the interview. See *Weingarten*, supra, 420 U.S. at 258–259. Therefore, it did not violate Section 8(a)(1) for Caponigro to elect not to conduct the investigatory interview after Rose invoked his *Weingarten* rights.

The remaining issue concerns whether the Respondent's warning letter constituted unlawful retaliation motivated by Rose's Weingarten request for representation. The General Counsel argues that Caponigro had not decided to discipline Rose at the time Caponigro asked Rose to explain why he had been delayed; the Weingarten request was immediately followed by Caponigro's announcement that Rose would be disciplined; and the warning letter stated that it was being issued because Rose—after being asked to explain his delays-could offer "no valid reason." Therefore, the General Counsel essentially argues that the warning letter was unlawful because Rose's Weingarten request was the "but for" cause of his discipline: Rose received the warning letter based on his failure to explain his delay leaving the vard, and the lack of an explanation was attributable to Rose's request for Weingarten representation (since Caponigro, after Rose made his Weingarten request, abandoned any further investigation and announced that Rose would be disciplined).

The judge correctly recognized that *Weingarten* gives employees a right to union representation during investigative interviews, but it does not afford immunity for unexplained misconduct. Under *Weingarten*, Rose had a right to request the presence of a *Weingarten* representative when Caponigro asked Rose about the delay leaving the yard.⁴ However, Caponigro—having already ob-

³ Weingarten, 420 U.S. at 258–259 (quoting Mobil Oil Corp., 196 NLRB 1052, 1052 (1972), and Quality Mfg. Co., 195 NLRB 197, 198–199 (1972)) (quotation marks and citations omitted) (emphasis added).

⁴ Although the judge properly determined that Rose's warning letter was not a violation of Sec. 8(a)(1), we disagree with his finding that Rose lacked a reasonable belief that Caponigro's inquiry could result in discipline. (This finding, if true, would mean that Rose lacked a right to request *Weingarten* representation, since *Weingarten* provides such a right only when an investigative interview could reasonably result in potential discipline.) The judge reasoned that, if Rose truly had a valid reason for his delay, he could not have reasonably feared discipline. However, Rose was at least an hour late leaving the yard, and his dock supervisor asked why. In this situation, Rose could reasonably fear that his tardy departure might result in discipline, particularly if he lacked

served Rose leaving at least one hour late—was permitted under *Weingarten* to abandon his effort to obtain an explanation from Rose. And Caponigro was "free to act on the basis of whatever information he had *and without such additional facts as might have been gleaned through the interview." Weingarten*, 420 U.S. at 259 (quoting *Quality Mfg. Co.*, 195 NLRB 197, 199 (1972)) (emphasis added).

Weingarten does not require employers to conduct or continue an investigative interview, nor does it require employers to undertake other investigative steps before imposing discipline. Also, nothing in Weingarten prevents an employee from providing an exculpatory explanation in some manner not involving a back-and-forth oral exchange of questions and answers. However, the Supreme Court's decision in Weingarten states—three times—that invoking Weingarten rights may lawfully result in employees being disciplined due to a failure to convey relevant explanations to the employer. Thus, Rose's assertion of his Weingarten rights did not immunize him from the consequences of his unexplained late departure from the yard.

As the judge correctly observed, although Rose was disciplined *after* he invoked his *Weingarten* rights, it does not follow that he was disciplined *because* he invoked those rights. The judge specifically credited Caponigro's testimony that he disciplined Rose for misusing company time, and *not* based on hostility towards Rose's request for *Weingarten* representation. This credibility determination, together with the record as a whole, persuade us that the record is not sufficient to establish a violation of the Act on these facts.⁶

We agree with our dissenting colleague that, if an employee invokes his or her right to have *Weingarten* repre-

the assistance of a Weingarten representative during relevant questioning

sentation, the employee may not lawfully be subjected to retaliation for making such a request. However, we do not agree that the timing of the disciplinary decision—i.e., the fact that it occurred after Rose requested Weingarten representation—means that Rose's Weingarten request must have been a motivating factor in his discipline. In this regard, our dissenting colleague reasons that "[n]othing else occurred to account for Caponigro's abrupt decision to impose discipline." Our colleague also relies on Rose's discipline letter because it cites his inability to offer a "valid reason" for his delay.

As noted previously, we believe these points are controlled by the parameters set forth very explicitly in the Supreme Court's Weingarten decision. The Supreme Court indicated that the assertion of Weingarten rights does not immunize employees from potential discipline for whatever alleged misconduct is under investigation, and the Supreme Court held that a right to Weingarten representation arises only when a matter is already at the point where the employee reasonably fears discipline. Here, Caponigro was responsible for determining whether Rose should be disciplined for leaving the yard late. After Rose invoked his Weingarten rights, Caponigro still had to decide whether discipline was warranted.⁷ At that point, as the Supreme Court indicated in Weingarten, Caponigro could deny the request and impose discipline, "act[ing] on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview." 420 U.S. at 259. We do not believe one can reasonably draw an inference of unlawful retaliation to the extent that an employer proceeds in the precise manner described as permissible in Weingarten itself. In these circumstances, neither the timing of the discipline decision nor Rose's reliance on the absence of an explanation reasonably supports a finding of retaliatory motivation. To draw such an inference without other evidence of a retaliatory motive would depart from the Supreme Court's decision in Weingarten. That is a step we may not take.

We emphasize that, if an employee invokes his or her *Weingarten* rights, *Weingarten* does not give immunity to every employer that moves forward with discipline. The General Counsel still may show that the decision to do so was unlawfully motivated. In this case, however, Caponigro personally observed Rose engage in a type of

In the instant case, for example, *Weingarten* only required Caponigro to provide representation, at Rose's request, had Caponigro persisted in asking questions about Rose's delay leaving the yard. Yet Rose could have volunteered information to Caponigro or others regarding any reason(s) for his delay in ways that would not have forfeited *Weingarten* rights. Rose could have timely submitted a written explanation (the record reveals that Rose described the reasons for his delay in an "August 12 letter"). He also could have asked co-employee or manager witnesses to provide exculpatory information to Caponigro (the record reveals that, according to Rose, a dispatcher, Chris Zurales, had relevant information, and "another manager" had instructed Rose to switch trailers, which accounted, in part, for his delay). While Caponigro had previously indicated an intent to issue discipline for this incident, we cannot assume that he would have ignored a timely, valid explanation

⁶ While not conclusive, the judge's credibility determination is entitled to some weight in the disposition of this case.

⁷ Thus, the record does not show that Caponigro had decided not to discipline Rose at the time he approached him, and then changed his mind only after Rose asked for union representation. If this were the case, there would have been no need for Caponigro to question Rose about his delay.

conduct (leaving the yard more than one hour late) that, if unexplained, would reasonably lead to a conclusion that discipline was warranted. The nature and magnitude of the discipline (issuance of a warning) does not reasonably suggest that Rose received a greater penalty than was warranted by the misconduct. There is no other evidence that the Respondent exhibited hostility towards *Weingarten* representation. And the judge had the opportunity to assess the credibility of witnesses, including Caponigro, and specifically credited Caponigro's testimony that he issued the warning to Rose for misusing company time, not in retaliation for invoking his *Weingarten* rights. On this record, therefore, we find that the General Counsel did not meet his burden of proving unlawful retaliation.

In sum, the judge found that Caponigro decided to give Rose an opportunity to explain his delayed departure before making a decision to discipline Rose. Recognizing the possibility of discipline for this delay, Rose declined to give an explanation without union representation of his choice. Caponigro then exercised his right not to conduct an interview, and—absent other evidence of retaliatory motivation—he had the right to warn Rose for conduct that, absent explanation, warranted discipline. Thus, we affirm the judge's finding that the Respondent did not violate Section 8(a)(1) by issuing Rose the August 8 warning letter.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. April 30, 2014

Philip A. Miscimarra,	Member
Harry I. Johnson, III,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHIFFER, dissenting in part.

As the Board reaffirms today, it is well established that an employee may not be disciplined for invoking his *Weingarten* right¹ to a representative at an investigatory interview. See, e.g., *Amoco Oil Co.*, 238 NLRB 551, 552 (1978). Contrary to my colleagues' view, the record here demonstrates that employee Fred Rose was indeed disciplined not merely *after* invoking his *Weingarten* right, but *because* he did so.² There is no good basis to conclude that Rose would have been disciplined even if he had not asked for a representative.

I.

The essential facts are undisputed: Respondent's dock supervisor, Vito Caponigro, observed Rose pulling his assigned truck out of the Respondent's yard approximately 1 hour later than his expected departure time. Caponigro approached Rose and asked why he was delayed. Rose asked whether Caponigro's question was investigatory. Caponigro said that he was asking Rose a question. Rose replied that, if the question was investigatory, he would like a union steward present. Caponigro initially told Rose that no stewards were then available and that Rose could pick someone else. But before Rose could select an alternative representative, Caponigro not only terminated the interview abruptly, but also immediately informed Rose that he would be disciplined for misusing company time.

The Respondent then mailed Rose a warning letter. The letter cited Caponigro's observation of Rose's belated departure from the yard and tellingly asserted that when asked by Caponigro, Rose "could offer no valid reason as to why [he was] delayed." Rose, however, had never been presented with a fair chance to do so. It is true that he did not offer a justification for his delay at the interview, but that was because he had requested a *Weingarten* representative and virtually as soon as he did, Caponigro announced that he would be disciplined.³

П

Relying on the Supreme Court's discussion in *Weingarten*, my colleagues present this as a case where an employee, by declining to participate in an interview without a representative, has deliberately "relinquish[ed]

⁸ We correct the judge's erroneous finding that the General Counsel failed to allege until the day of the hearing that the Respondent's dispatcher, Chris Zurales, was an agent of the Respondent. A week before the hearing opened, the General Counsel submitted a notice of intent to amend the complaint at the hearing to allege Zurales as an agent. We find it unnecessary to decide Zurales' status because it is not material to any issue in the case.

¹ NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

² I agree with my colleagues that the Respondent did not violate Sec. 8(a)(1) by refusing employee Rose's request for union representation, inasmuch as the Respondent discontinued the investigatory interview when Rose invoked his *Weingarten* right.

³ My colleagues neglect this fact in suggesting (see fn. 5, supra) that Rose could have presented exculpatory information *after* Caponigro terminated the interview. From the perspective of a reasonable employee in Rose's position, discipline was clearly a foregone conclusion at that point.

any benefit which might be derived from the interview," i.e., the chance to provide an excuse. *Weingarten*, 420 U.S. at 258. But that is not a fair characterization of what happened here. Supervisor Caponigro did not (in the Supreme Court's words) "advise the employee that [he would] not proceed with the interview unless the employee [was] willing to enter the interview unaccompanied by his representative." Id. Instead, after telling Rose that he could pick a representative, Caponigro instantly changed course, ending the interview *and* announcing that Rose would be disciplined. This cannot be what the *Weingarten* Court had in mind when it explained how employers may proceed in this setting.

The inescapable inference here, rather, is that a peeved Caponigro reacted to Rose's invocation of his Weingarten right by disciplining him. The Respondent's warning letter to Rose confirms as much. The letter cites Caponigro's observation of Rose's belated departure from the yard, which certainly could be a legitimate basis for discipline, considered alone. But the letter also relies on the assertion that Caponigro "could offer no valid reason as to why [he was] delayed"—although the Respondent knew full well that such an explanation was lacking because Rose requested a Weingarten representative, which prompted Caponigro to end the interview and impose discipline. According to the record evidence, Caponigro undisputedly did not intend to discipline Rose based solely on the observation that Rose was late leaving the yard.⁴ The only intervening event between Caponigro's asking Rose why he was delayed in leaving the yard and telling Rose he would be disciplined, was that Rose invoked his Weingarten right. Nothing else occurred to account for Caponigro's abrupt decision to impose discipline. In short, the record establishes that the Respondent disciplined Rose, at least in part, because instead of offering an explanation, he asked for a Weingarten representative.

Ш.

In cases like this one, the Board applies the analytical framework established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). E.g., *Barnard College*, 340 NLRB 934, 936 (2003). Accordingly, the relevant questions are whether the General Counsel established that Rose's invocation of his *Weingarten* rights was a motivating factor in the Respondent's issuance of the warning and, if

so, whether the Respondent established as an affirmative defense that it would have disciplined Rose even in the absence of that protected conduct. The circumstances here demonstrate that Rose's invocation of his *Weingarten* right was at least a motivating factor in the Respondent's decision to discipline him. And contrary to the judge, and to the implicit conclusion of my colleagues, the Respondent did not establish that it would have disciplined Rose for his late departure alone.

Under Wright Line, an employer cannot simply present a legitimate reason for its action. *Igramo Enterprise*, 351 NLRB 1337, 1338 fn. 10 (2007), rev. denied 310 Fed.Appx. 452 (2d Cir. 2009). "Nor is '[a] judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken . . . a substitute for evidence that the employer would have relied on this reason" in the absence of protected activity. Id. (quoting Hicks Oils & Hicksgas, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991)). Here, the Respondent offered no evidence, other than Caponigro's conclusory testimony, to support a finding that it would have disciplined Rose absent his request for a Weingarten repre-Although the judge said he "credit[ed]" Caponigro's testimony that he disciplined Rose for misusing company time, the judge's stated basis for doing so was Rose's tardiness in leaving the yard and his failure to explain why. That basis is infirm. As explained, Rose's decision not to answer Caponigro's question without a union representative present was statutorily protected, and thus was not a permissible ground for discipline. I therefore would reject the judge's finding that Caponigro's testimony suffices to sustain the Respondent's Wright Line defense.

Despite any implication to the contrary in my colleagues' opinion, this result does not require disturbing any credibility resolution that warrants our deference. As stated, the Respondent has consistently offered Rose's failure to explain his tardiness as part of the grounds for imposing discipline. Even if Caponigro had testified that he was not motivated, even in part, by Rose's failure to offer an explanation, the Board's traditional policy of deference to a judge's credibility resolutions would not require that we defer to the judge's evaluation of Caponigro's self-serving, conclusory testimony in this instance. Rather, where, as here, the ultimate issue is a respondent's motivation for disciplining an employee, we consider all the record evidence taken as a whole.⁵

⁴ I agree with my colleagues that the record does not show that Caponigro previously had decided *not* to discipline Rose (see fn. 7, supra), but the record is clear that the converse is equally true.

⁵ See *Desert Toyota*, 346 NLRB 132, 135 (2005), rev. denied, sub nom. *Machinists District Lodge 845 v. NLRB*, 265 Fed.Appx. 547 (9th

For all of those reasons, I would find that the Respondent violated Section 8(a)(1) of the Act by its August 8 warning letter to Rose.

Dated, Washington, D.C. April 30, 2014

Nancy Schiffer,

Member

NATIONAL LABOR RELATIONS BOARD

Christina B. Hill, Esq, for the General Counsel.

Jeffrey R. Vlasek and Todd A. Dawson, Esqs. (Baker Hostetler, Cleveland, Ohio), for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on January 17, 2012. Fred Rose, the Charging Party, filed the charge on August 17, 2012, and the General Counsel issued the complaint on October 24, 2012.

The General Counsel alleges that Respondent, YRC Freight, by its dock supervisor, Vito Caponigro, violated Section 8(a)(1) of the Act by denying the request of the Charging Party, Fred Rose, for a union representative during an interview on August 2, 2012. The General Counsel also alleges that Respondent violated Section 8(a)(1) in issuing Rose a warning letter because of Rose's refusal to answer questions in the absence of a union representative.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a trucking company. It has a facility in Bolingbrook, Illinois, where it annually derives gross revenues in excess of \$50,000 from the transportation of freight in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 179 of the International Brotherhood of Teamsters, which represents employees at the Bolingbrook facility, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At about 7:47 a.m. on August 2, 2012, Respondent's dock supervisor, Vito Caponigro, saw the Charging Party, Fred Rose, in a tractor trailer, beginning to pull out of Respondent's yard. Rose had reported to work that day at his normal starting time

Cir. 2008) (unpub.); *Rock Tenn Co.*, 234 NLRB 823, 824 fn. 5 (1978) (citing *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547, 1551 (1954)) ("The testimony of witnesses as to their conclusions, opinions, or motivations does not constitute factual matter and thus stands apart from the direct credibility of witnesses").

of 6 a.m. Normally, Rose would be expected to leave Respondent's yard to drive his route and make freight deliveries by 6:30 to 6:45.

There is little, if any, dispute as to what occurred and what was said. Caponigro asked Rose why he was delayed leaving the yard. Rose replied by asking if Caponigro was conducting an investigation. Caponigro responded that he was asking Rose a question. Rose then stated that if Caponigro was conducting an investigation, he wanted a union steward present.

Caponigro told Rose there was no union steward present at the yard and asked him who he wanted to represent him instead. Rose asked to see a list of employees who were at the yard. Caponigro may have asked Rose again who he wanted to represent him, but then told Rose without further discussion that he was issuing Rose a disciplinary warning for misuse of company time, Tr. 3435, 6566. Caponigro did not ask Rose any more questions about why he was late leaving the yard after Rose requested union representation.

About a half-hour after this conversation, Caponigro emailed other management officials about his encounter with Rose, GC Exh. 2. On August 8, Caponigro mailed Rose a letter stating that he was being warned regarding misusing company time on the morning of August 2, Jt. Exh. 2. In that letter Caponigro stated, "I asked you what were your delays. You could offer no valid reason as to why you were delayed."

Rose may have mailed Respondent a rebuttal letter on August 12, which may have been received by Respondent on August 17, giving his reasons for his delay in leaving the yard on August 2, GC Exh. 5. Caponigro and Respondent's terminal manager, John Ralston, testified they had not seen this letter prior to the January 17, 2013 hearing in this matter. Ralston testified the letter is not in Rose's personnel file. In any event, this letter is completely irrelevant to this case since it could not have been received until after Respondent issued Rose the warning letter.

Rose also filed a grievance on August 13, in which he alleged that Respondent violated the Union's collective-bargaining agreement, but did not provide any explanation for his delay in leaving the yard on August 2. Due to the fact that the discipline did not rise to the level of a suspension it was not subject to the grievance procedure in the collective-bargaining agreement.

ANALYSIS

The term "Weingarten rights" refers to a decision of the United States Supreme Court in *NLRB v. Weingarten, Inc.*, 420 US 251 (1975), in which the Court held that the Board's construction of Section 7 of the Act, with regard to interviews with potentially disciplinary consequences, was permissible. That construction was that Section 7 creates a statutory right to refuse to submit without union representation to an interview which the employee reasonably fears may result in the employee's discipline. The court noted that the Board's construction in *Weingarten* emanated from several prior cases in which the Board shaped the contours and limits of this statutory right.

The Court quoted extensively from the Board's opinions in *Quality Mfg. Co.*, 195 NLRB 197 (1972), and *Mobil Oil Corp.*, 196 NLRB 1052 (1972). Thus the decision makes it clear that

the parameters of the *Weingarten* right are those set forth by the Board. First the Board found it was a serious violation of the Act to deny an employee's request for union representation and compel the employee to *appear unassisted at an interview which may put his job security in jeopardy* (emphasis added).

Second, the right arises only where the employee requests union representation. Third, the right is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. The Board noted that the rule did not apply to run of the mill shop floor conversations such as those in which the employee is given instructions or training or needed corrections of work techniques.

Fourth, the Board stated that the exercise may not interfere with legitimate employer prerogatives. Thus, the employer need not justify refusing to grant the employee union representation, but rather is entitled to conduct an inquiry into the employee's conduct without the employee's participation. The employer is then free to act on the basis of information derived from other sources. Fifth and finally, the Board noted that the employer has no duty to bargain with the union representative. It is free to insist that it is only interested in hearing the employee's own account of the matter under investigation.

It is condition #4 that is most relevant to the instant case. Respondent, by Vito Caponigro, was not required to accord Fred Rose union representation. Caponigro was well within his rights in disciplining Rose on the basis on the information he had on the morning of August 2. The Board in *Mobil Oil*, stated:

The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.

At the time Caponigro decided to discipline Rose all he knew, from personal observation, was that Rose was at least an hour late leaving Respondent's yard. The fact that Caponigro did not decide to discipline Rose until he asked for union representation does not necessarily establish that Rose was disciplined for asserting his *Weingarten* rights. The fact that B occurred after A does not necessarily mean that B was the result of A, particularly when there is an alternative explanation for B

Were I to conclude that Respondent's warning letter was motivated by a desire to retaliate against Rose for asking for union representation, I would find a violation of the Act. However, such an inference is not warranted here. Rose was clearly an hour late starting his route and given his failure to offer

Caponigro any explanation, I credit Caponigro's testimony that he disciplined Rose for misusing company time.¹

The General Counsel's brief suggests at pages 67 that Caponigro knew the reasons for Rose's delay when he encountered Rose at 7:47. This, the General Counsel suggests, establishes that Rose was disciplined for insisting on his *Weingarten* rights. I reject any such argument for the following reasons: first, I decline to credit Rose's testimony as to the reasons for his delay in the view of Caponigro's testimony at Tr. 6869 that he had personal knowledge that at least one of the reasons belatedly offered by Rose was false. Caponigro testified that the load that Rose was to deliver was ready for shipment on schedule.

The General Counsel relies on Rose's uncontradicted testimony about conversations with Respondent's dispatcher, Chris Zurales in suggesting that Caponigro knew that Rose had a legitimate excuse for leaving Respondent's yard an hour late. I find it unfair for the General Counsel to rely on testimony regarding Rose's conversations with Zurales given that she was not alleged to be an agent of Respondent until the day of trial. Moreover, there is no evidence that Zurales advised Caponigro of whatever transpired between her and Rose on the morning of August 2.

I also conclude that the General Counsel has not established that Rose reasonably believed that Caponigro's inquiry would result in disciplinary action. If the explanations Rose gave at trial and in his August 12 letter for the delay on August 2 are accurate, there is no basis for concluding that Rose reasonably feared discipline had he told Caponigro that he was late leaving the yard for the reasons he proffered belatedly.²

CONCLUSIONS OF LAW

Respondent did not violate the Act either in refusing to provide Fred Rose with union representation on August 2, 2012 or in issuing him a disciplinary warning letter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed. Dated, Washington, D.C., February 15, 2013.

¹ Assuming the General Counsel made an initial showing of a statutory violation, I find that Respondent met its burden of proving a non-discriminatory motive for the warning.

² At trial and in his August 12 letter, Rose stated that he was leaving the yard late because his load wasn't ready on time, that he had been told by another manager to switch trailers due to the lack of air conditioning in the first trailer and that he had to get window washer fluid in the second trailer

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purnoses.